2013 IL App (1st) 121993-U

SECOND DIVISION December 10, 2013

No. 1-12-1993

NOTICE: This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

APPELLATE COURT OF ILLINOIS FIRST JUDICIAL DISTRICT			
THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from	
·)	the Circuit Court	
Petitioner-Appellee,)	of Cook County.	
)		
v.)	No. 11 JD 4778	
)		
MIGUEL C.,)	Honorable	
)	Patricia Mendoza,	
Respondent-Appellant.)	Judge Presiding.	

PRESIDING JUSTICE QUINN delivered the judgment of the court. Justices Simon and Pierce concurred in the judgment.

ORDER

- ¶ 1 *HELD*: Minor-respondent's conviction of aggravated battery reduced to battery where the State failed to establish great bodily harm beyond a reasonable doubt; cause remanded for a dispositional hearing.
- ¶ 2 Following an adjudicatory hearing, minor respondent Miguel C. was found guilty of aggravated battery, then placed on probation for five years. On appeal, respondent contends that the State failed to prove him guilty of aggravated battery beyond a reasonable doubt and that his mandatory minimum sentence of five years' probation violates the equal protection clauses of the United States and Illinois Constitutions. For the following reasons, we reverse and remand.

¶ 3 I. BACKGROUND

- The record shows, in relevant part, that on August 16, 2011, respondent and his two brothers, Jackson C. and Justin C. (collectively, the brothers), were involved in a gang-related altercation with the victim, Marcelo S. The State subsequently filed a petition for adjudication of wardship alleging that respondent was delinquent based on two counts of aggravated battery. The first count alleged that respondent "knowingly caused great bodily harm to Marcelo ***, in that he hit the victim about the head and body, causing a laceration which required stitches to heal." The second count alleged that respondent, "by use of a deadly weapon, a knife, knowingly caused bodily harm to Marcelo ***, in that he hit the victim about the head and body, causing a laceration which required stitches to heal."
- The brothers were tried at a joint adjudicatory hearing. At that hearing, Marcelo testified that he was 15 years old on August 16, 2011. A little before 7 p.m. that day, he was with two friends, Jasmine and Ashley, getting a haircut in the area of 3300 West 59th Street. After his haircut, he left the barbershop and walked across the street towards his home when respondent and his two brothers approached and asked, "What do you claim?" He understood this to mean, "What gang am I in." Marcelo responded that he was not "affiliated," and Justin ran towards him to fight. The other two went in another direction "to get objects."
- Respondent and Jackson began throwing rocks at Marcelo, which hit him about his head and body. Respondent also threw a bottle at him, which cut his right hand and left a three-inch scar. Justin, meanwhile, hit Marcelo in the head with a "four by four" piece of wood, causing the wood to break into two pieces. He then pulled a knife from his pocket and cut Marcelo on the left

shoulder. After being cut, Marcelo felt "faint" and "dizzy" and immediately fell to the ground. At that moment, police arrived, and the brothers ran off. Marcelo testified that police tried to speak with him, but he was "really scared" and was not talking to them. Marcelo testified that he was taken by ambulance to Christ Hospital where the only treatment he received was for the knife wound, which required 12 stitches and left a four or five-inch scar on his left arm.

- ¶ 7 Marcelo testified that he did not know the names of all three brothers on August 16, 2011, but did know them by appearance as the "[C.] brothers." He testified that he knew them from the neighborhood, had seen them on many occasions on the streets, and had known them for more than six months before the incident.
- ¶ 8 On cross-examination, Marcelo acknowledged being affiliated with the Latin Kings gang on the day in question. He also stated that when Justin was approaching him and the other two brothers were off getting "objects," he was "watching behind" Justin for them and they returned very quickly. He could not recall the distance at which respondent threw the bottle. He stated that another brother "came to the scene of the crime" after the incident in question while he was still on the ground.
- Marcelo's friend Jasmine testified that about 5 p.m. on August 16, 2011, she and Ashley accompanied Marcelo while he got a haircut. Afterwards, they were walking to Marcelo's house and had crossed the street when the brothers and "some other guy" approached them, flashed gang signs, and asked Marcelo about his gang affiliation. Marcelo told them that he did not "want problems" and did not "gang bang." However, they began throwing rocks and Jackson threw a bottle. Justin also hit Marcelo on the head and about his body with a board, which eventually broke. He and Marcelo then began wrestling while Ashley pleaded for Justin to stop. When police eventually

arrived, Jasmine heard someone say, "Oh, 50, the police," at which point the assailants fled. Jasmine testified that Marcelo was on the ground, pale, and appeared to be in pain. She also testified that there was blood "like gushing" and that she attempted to stem the blood loss by wrapping a shirt around Marcelo's left arm. Jasmine did not see Justin pull out a knife.

- ¶ 10 On cross-examination, Jasmine stated that the brothers flashed "pitch fork" gang signs, which indicates affiliation with the Satan Disciples. She also stated that after Marcelo denied any gang affiliation, Justin kept talking to Marcelo while the other three went into an alley. She stated that only two people returned to throw objects at them and that "[t]hey were throwing bottles."
- ¶11 Chicago police officer Juan Ortiz testified that on August 16, 2011, he was flagged down by either Jasmine or Ashley at 3343 West 59th Street. When he arrived at the scene, he called for an ambulance because Marcelo was "bleeding profusely" from his left arm. He testified that there was a "very good size wound" on his arm that appeared to have been caused by a knife and that ultimately required 12 stitches. There were also some "small lacerations" on his right hand. Marcelo tried to give information, but was "light headed" and "to the point of fainting." After he was transported to Holy Cross Hospital, police taped off the scene and found a broken bottle and a board with blood on it in the street where the incident occurred. They also found a brick on the parkway.
- ¶ 12 About 10 minutes after Officer Ortiz arrived on the scene, Justin and his mother came by and spoke with police. Justin showed them his hand, which had "like a scrape" on it, and his mother requested an ambulance for him because she thought that he was the victim. They called an ambulance for him, but "didn't see the need for it."
- ¶ 13 At the close of the State's case, respondent's motion for a directed finding was denied. His

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brother Jackson testified that about 5 p.m. on August 16, 2011, the brothers were walking home from McDonald's when they encountered Marcelo, accompanied by two girls and a boy. Marcelo shouted out to them, "What up King love," then said, "If you run up, I'm going to slash you." The brothers approached to identify him, and Marcelo began throwing rocks at them, which they then threw back. Jackson testified that he was unarmed and that respondent left when the rocks were being thrown. He also testified that when Justin was able to get closer to Marcelo and his companions, Ashley grabbed his hand, and Marcelo slashed him in the arm with a knife. When the police arrived, Jackson went home. He testified that none of the brothers caused any injuries to Marcelo and that Justin's wound required stitches. On cross-examination, Jackson stated that there was a fourth individual with the brothers during the incident in question.

- ¶14 Connie C., the mother of the three respondents, testified that on August 16, 2011, Justin came home with a cut on his arm, and she took him to Holy Cross Hospital. He received 12 stitches in his arm, 2 stitches in his finger, and now has a scar on his hand above the wrist. On cross-examination, Connie stated that respondent had already been home for about 10 to 15 minutes when Justin returned home with his injury on the day in question. She also stated that she lived a block and a half away from where the incident occurred and that it would take "not even a minute" for someone to run the distance between those locations.
- ¶ 15 Respondent testified that he did not throw any rocks or bottles at anyone on the day in question. He also testified that he went home as soon as there was trouble.
- ¶ 16 After the brothers rested their respective cases, the court found Marcelo's testimony to be credible, but not that of the brothers. It further noted, "I'm not naive enough to think to [sic] that

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there weren't an exchange of words on both sides, but it was carried to a very different level and the

*** brothers bare [sic] the consequences of that." Ultimately, the court ruled:

"With respect to Justin [C.] there will be a fining [sic] of guilty on both counts. With respect; however, to Miguel and Jackson, I know that the State is arguing for an accountability theory, I will find them guilty on Count I. Since what I do believe—there was no testimony that they were all involved in this knife incident. There was testimony that they were involved in the throwing items that hit the minor. So with Jackson and Miguel there is a finding of guilty on Count I ***."

Thereafter, the court placed respondent on probation for five years. Respondent now appeals pursuant to Illinois Supreme Court Rule 606 (eff. Feb. 6, 2013).

¶ 17 II. ANALYSIS

Respondent first contends that the State failed to prove him guilty of aggravated battery beyond a reasonable doubt. Where, as here, defendant challenges the sufficiency of the evidence to sustain his conviction, the question for the reviewing court is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *People v. Campbell*, 146 Ill. 2d 363, 374 (1992). It is the responsibility of the trier of fact to determine the credibility of the witnesses and the weight to be given their testimony, to resolve any inconsistencies and conflicts in the evidence, and to draw reasonable inferences therefrom. *People v. Sutherland*, 223 Ill. 2d 187, 242 (2006). A reviewing

court will not overturn the decision of the trier of fact unless the evidence is so unreasonable, improbable, or unsatisfactory as to justify a reasonable doubt of defendant's guilt. *Campbell*, 146 Ill. 2d at 375.

- ¶ 19 To sustain respondent's conviction of aggravated battery, the State was required to prove that respondent knowingly caused great bodily harm to Marcelo while committing a battery. 720 ILCS 5/12-3.05(a)(1) (West 2010). "A person commits battery if he or she knowingly without legal justification by any means (1) causes bodily harm to an individual or (2) makes physical contact of an insulting or provoking nature with an individual." 720 ILCS 5/12-3(a) (West 2010).
- ¶ 20 Viewed in the light most favorable to the State, the record shows that on the afternoon of August 16, 2011, Marcelo and his friends, Jasmine and Ashley, were walking to Marcelo's house when they ran into the brothers and another individual. The brothers flashed gang signs and asked Marcelo, "What do you claim?" *i.e.*, his gang affiliation. Marcelo responded that he was not affiliated with a gang, at which point Justin approached Marcelo while the other three went into an alley. As Justin approached, Marcelo was "watching behind" Justin for his other brothers. They returned very quickly and began throwing rocks at Marcelo. Respondent also threw a bottle, which cut Marcelo's right hand and left a three-inch scar. Justin, meanwhile, hit Marcelo in the head with a "four by four" piece of wood, then pulled a knife from his pocket and cut Marcelo on the left shoulder. Marcelo fell to the ground immediately. Police then arrived, and someone said, "Oh, 50, the police," at which time the brothers fled. Marcelo was subsequently taken to the hospital, received 12 stitches, and now has a four or five-inch scar on his left arm.
- ¶21 Respondent initially claims that the State failed to prove that he was present during the fight

and that he threw objects at Marcelo. He argues that Marcelo's testimony was unreliable and that he presented credible evidence that he left the scene before the fight occurred. The State responds that the evidence showed respondent was an active participant in the fight and that Marcelo's identification of him was trustworthy and reliable.

- ¶ 22 It is well settled that "[a] single witness' identification of the accused is sufficient to sustain a conviction if the witness viewed the accused under circumstances permitting a positive identification." *People v. Slim*, 127 Ill. 2d 302, 307 (1989). "This is true even in the presence of contradicting alibi testimony, provided that the witness had an adequate opportunity to view the accused and that the in-court identification is positive and credible." *Slim*, 127 Ill. 2d at 307.
- ¶ 23 In assessing the reliability of an identification, we consider several factors, including: "(1) the opportunity the victim had to view the criminal at the time of the crime; (2) the witness' degree of attention; (3) the accuracy of the witness' prior description of the criminal; (4) the level of certainty demonstrated by the victim at the identification confrontation; and (5) the length of time between the crime and the identification confrontation." *People v. Lewis*, 165 Ill. 2d 305, 356 (1995). Another factor in determining whether a witness' identification has an independent origin is whether the witness had "'any acquaintance with the suspect prior to the crime.' " *People v. McTush*, 81 Ill. 2d 513, 521 (1980) (quoting *People v. Blumenshine*, 42 Ill. 2d 508, 514 (1969)).
- ¶ 24 Here, we believe that Marcelo had an adequate opportunity to view respondent at the time of the crime where the incident in question occurred on a late summer afternoon, Marcelo knew respondent from the neighborhood, and he observed respondent return from the alley while Justin was approaching him and begin to throw objects at him. *People v. Reed*, 80 Ill. App. 3d 771, 778

- (1980). In addition, we find that Marcelo paid a high degree of attention to respondent where he testified that he was watching behind Justin for the other brothers to return and where respondent presented a threat of danger to him. While there was no testimony regarding a prior description of respondent by Marcelo, Marcelo also did not waver in identifying respondent at trial as one of the attackers and the individual who threw the bottle at him. Finally, Marcelo's familiarity with respondent mitigates any unreliability stemming from the nine months between the crime and the in-court identification. *People v. Morris*, 65 Ill. App. 3d 155, 161 (1978). Having considered the necessary factors, we find Marcelo's in-court identification of respondent sufficient to support his conviction. *Slim*, 127 Ill. 2d at 307.
- Respondent takes issue with this conclusion and argues that "Marcelo's identification of [him] is too unreliable to overcome the credible testimony of the defense witnesses that [he] was not present" when objects were thrown at Marcelo. We reject this argument. As discussed above, the relevant factors support the reliability of Marcelo's identification of respondent. The trial court also expressly found the brothers' testimony lacking in credibility. Under these circumstances, we have no basis for reversing the trial court's finding. *Campbell*, 146 Ill. 2d at 375.
- Respondent next claims that the State failed to establish that any of the objects thrown at Marcelo caused great bodily harm and that his conviction should therefore be reduced to battery. The State responds that the trial court found respondent guilty of aggravated battery under an accountability theory for the stab wound inflicted by Justin and, thus, the evidence established great bodily harm.
- ¶ 27 We initially disagree with the State that the trial court found respondent accountable for the

stab wound inflicted by Justin. Here, the trial court ruled:

"With respect to Justin [C.] there will be a fining [sic] of guilty on both counts. With respect; however, to Miguel and Jackson, I know that the State is arguing for an accountability theory, I will find them guilty on Count I. Since what I do believe—there was no testimony that they were all involved in this knife incident. There was testimony that they were involved in the throwing items that hit the minor. So with Jackson and Miguel there is a finding of guilty on Count I ***."

Reading the court's statements in context, it is clear that the court found respondent and Jackson guilty only of throwing items at Marcelo. The count of which respondent was convicted made no specific mention of a knife, unlike the other count which charged that respondent, "by use of a deadly weapon, a knife, knowingly caused bodily harm to Marcelo." Also, if the court had found that respondent was accountable for the stab wound, it would not have pointed out that "there was no testimony that they were all involved in this knife incident," but that "[t]here was testimony that they were involved in the throwing items that hit the minor." The only conclusion to be drawn here is that the trial court made a conscious decision to find respondent guilty only of throwing items at Marcelo. We therefore turn to the issue of whether the items thrown at Marcelo caused him great bodily harm.

¶ 28 The term "great bodily harm" is not susceptible of a precise legal definition, but requires an injury of a greater and more serious character than an ordinary battery. *People v. Figures*, 216 Ill. App. 3d 398, 401 (1991). An ordinary battery requires "'some sort of physical pain or damage to

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the body, like lacerations, bruises or abrasions, whether temporary or permanent.' " *Figures*, 216 Ill. App. 3d at 401 (quoting *People v. Mays*, 91 Ill. 2d 251, 256 (1982)). "The question of whether the victim's injuries rise to the level of great bodily harm is a question for the trier of fact [citation], which is neither dependent upon hospitalization of the victim, nor the permanency of his disability or disfigurement [citation]." *Figures*, 216 Ill. App. 3d at 401. "Instead, the determination centers upon the injuries which the victim did, in fact, receive." *Figures*, 216 Ill. App. 3d at 401.

- ¶ 29 Here, the only evidence of injury to Marcelo from the thrown items was a cut on his right hand that was caused by the bottle respondent threw at him. Marcelo testified that the cut left a three-inch scar. However, Marcelo testified that he did not receive medical treatment for that cut. Further, Officer Ortiz described seeing only "small lacerations" on Marcelo's right hand. Under the circumstances, we cannot say that the evidence established beyond a reasonable doubt that the cut on Marcelo's hand rose to the level of great bodily harm. *Figures*, 216 Ill. App. 3d at 401. We thus reduce respondent's aggravated battery conviction to battery and remand the cause for a dispositional hearing. We do not address respondent's sentencing claim in light of our ruling.
- ¶ 30 For the reasons stated, we reduce respondent's conviction to battery and remand the cause for a dispositional hearing.
- ¶ 31 Reversed and remanded.